Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-271

BANK OF THE COMMONWEALTH,
Petitioner,

—against—

ISRAEL-BRITISH BANK (LONDON) LIMITED, Bankrupt,
Respondent,

and

FEDERAL DEPOSIT INSURANCE CORPORATION, as successor in interest to Franklin National Bank,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner Bank of the Commonwealth prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit reversing the order of the District Court which had dismissed Respondent's voluntary petition in bankruptcy for lack of subject matter jurisdiction. This is a companion petition to one being filed by Federal Deposit Insurance Corporation, Petitioner's co-appellee in the Court of Appeals, and both petitions are accompanied by a Joint Appendix.

Opinions Below

The opinion of the Court of Appeals is reported at—F.2d—(2 Cir. 1976) and is included as Appendix A to the Joint Appendix. The opinion of the District Court, reversing the decision of the Bankruptcy Court which had denied Petitioner's motion to dismiss Respondent's bankruptcy petition, is reported at 401 F. Supp. 1159 (S.D.N.Y. 1975) and is included as Appendix B to the Joint Appendix. The opinion of the Bankruptcy Court is reported at 1 Bankr. Ct. Dec. 528 and is included as Appendix C to the Joint Appendix.*

Jurisdiction

The judgment of the Court of Appeals was entered on May 25, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

Did the Bankruptcy Court have jurisdiction to entertain a voluntary petition in bankruptcy of a foreign banking corporation not doing business in the United States, but having assets located here, when it does not have jurisdiction under section 4(a) of the Bankruptcy Act to entertain the like petition of a domestic banking corporation?

Statutes Involved

Sections 1(8), 1(23), 2(a)(1) and 4 of the Bankruptcy Act, 11 U.S.C. §§ 1(8), 1(23), 11(a)(1) and 22 are included as Appendix D to the Joint Appendix.

Statement of the Case

Petitioner Bank of the Commonwealth (herein "Commonwealth") seeks review of the decision of the Court of

* Figures in parentheses preceded by the letters A or B refer, respectively, to pages of the decisions of the Court of Appeals or of the District Court, as the same appear in the Joint Appendix.

Appeals, which reversed the order of the District Court dismissing the voluntary petition in bankruptcy of Respondent Israel-British Bank (London) Limited (herein "IBB").

IBB is a banking corporation organized and existing under the laws of the United Kingdom and maintained its principal place of business for the conduct of its banking activities in London, England. Commonwealth is a banking corporation organized and existing under the laws of the State of Michigan.

On April 16, 1974, Commonwealth advanced the sum of $500,000 to IBB for a period of 90 days, such funds being made available to IBB, at its direction, in New York City. When IBB failed to repay the loan at its maturity on July 15, 1974, Commonwealth commenced an action in the United States District Court for the Southern District of New York, Docket No. 74 Civ. 3101, for the recovery of the monies loaned, together with interest thereon. Jurisdiction over IBB was obtained by attaching certain of its assets having a situs in New York. Upon the failure of IBB to appear or answer, following personal service of the Summons and Complaint upon it in London, Commonwealth obtained a judgment against it on September 11, 1974 in the sum of $519,923.90.

In the interim and on August 2, 1974, IBB filed a petition with the High Court, Chancery Division, of the United Kingdom, seeking a voluntary winding up of its affairs and on August 6, 1974 a Provisional Liquidator was appointed. On September 23, 1974, IBB acting through the Provisional Liquidator appointed by the High Court, filed a voluntary petition in bankruptcy in the District Court pursuant to Section 2(a)(1) of the Bankruptcy Act (herein the "Act").

On October 2, 1974, Commonwealth moved in the Bankruptcy Court for an order vacating and setting aside the adjudication of bankruptcy made on September 23, 1974,

and dismissing the voluntary petition. The basis of that motion was that under Section 4(a) of the Act, the Bankruptcy Court was without jurisdiction over the subject matter of the proceeding in that that Section provides: "Any person except a . . . *banking corporation* . . . shall be entitled to the benefits of this Act as a voluntary bankrupt."

The Bankruptcy Court denied Commonwealth's motion to dismiss. Together with Federal Deposit Insurance Corporation (herein "FDIC"), which had succeeded to the assets of Franklin National Bank, a co-movant in the Bankruptcy Court, Petitioner appealed to the District Court which on October 10, 1975 reversed the order of the Bankruptcy Court and dismissed IBB's petition.

On May 25, 1976, the Court of Appeals reversed the order of the District Court, predicating its conclusion on a finding that IBB, although a banking corporation in the United Kingdom, did not conduct a banking business in the United States. On this basis, the Court held that IBB was not a "banking corporation" within the meaning of Section 4(a) of the Act.

Reasons for Granting the Writ

The Court of Appeals Has Wrongly Decided an Important Question of Federal Bankruptcy Jurisdiction Which Has Not Been, But Should be, Settled by This Court.

In substantiation of this reason for the granting of certiorari, Petitioner Commonwealth adopts the arguments made by co-petitioner FDIC at pages 4 to 8 of its companion petition.

The Court of Appeals' Decision was an Unauthorized Exercise of Congress' Legislative Function and Conflicts in Principle With Decisions of This Court.

Both the Court of Appeals and the District Court recognize this to be a case "of first impression" (A-5a; 401 F. Supp. at 1160). That circumstance, however, did not signify that section 4 of the 1910 Act (Public Law 294, 61st Congress, 36 Stat. at L. 838 Chap. 412), and its counterparts in the 1898 Act (Public Law 171, 55th Congress, 30 Stat. at L. 544 Chap. 541) and the 1867 Act (March 2, 1867, 39th Congress, 14 Stat. at L. 517 Chap. 176)[1] had not been subject to extensive judicial analysis over many decades. The learning distilled from these earlier cases, comparatively little of which found its way into the Court of Appeals' opinion, although by no means controlling, had shed considerable light on Congressional intent,[2] as well as relevant policy considerations.

In this case, the District Court had perceived no requirement in the Act that a foreign banking corporation must "*operate* as a bank within the United States" in order to fit within the Act's exceptions, and refused to "write such

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1. Much of the language of §4(b) of the 1910 Act was derived from the 1867 Act. Under that statute it had been held that railroad corporations (*Sweatt* v. *Boston H & E R. Co.*, 23 F. Cas. 530 [C.C.D. Mass. 1871]), insurance corporations (*In re Independent Ins. Co.*, 13 F. Cas. 13 [C.C.D. Mass. 1872]) and state banking corporations (*Thornhill* v. *Bank of Louisiana*, 23 F. Cas. 1139 [C.C.D. La. 1870] appeal dismissed *sub nom. Morgan* v. *Thornhill*, 78 U.S. 65 [1870]), but not national banks (*In re Manufacturer's National Bank*, 16 F. Cas. 665 [N.D. Ill. 1873]), were amenable to involuntary bankruptcy proceedings.

2. For example, in *Gamble* v. *Daniels*, 39 F.2d 447, *appeal dismissed* 281 U.S. 705, *cert. denied* 282 U.S. 848 (1930) the Eighth Circuit had concluded (at p. 450):

> "We have no doubt that when Congress used the words 'banking corporation' it meant corporations which were *authorized by the laws of their creation* to do a banking business." [Emphasis added].

a requirement into the Act" 401 F. Supp. at 1162 (B-4b). The Court of Appeals, however, adopted a wholly different judicial philosophy and, applying a factual "activities" test to its determination of jurdisdiction *vel non* (A-11a-12a), evinced no such reluctance. The "activities" approach had, because of the language of that statute, chara terized the decisions under the 1898 Act, but it was one which had been intentionally discarded by the draftsmen of the 1910 Act, as this Court had made perfectly clear in *Vallely* v. *Northern Fire and Marine Insurance Co.*, 254 U.S. 348 at 355 (1920). Notwithstanding this Court's injunction in *Vallely* that to extend the application of the Act to one of the excluded corporations, even—as in that case—with its acquiescence, was "to enact a law, not to execute one" (p. 356),[3] the Court of Appeals had no compunction about filling in what it determined to be a chink in the armor of the Bankruptcy Court "that Congress [had] failed to consider" (A-6a). By so doing, that Court appropriated to itself a legislative function.

With due deference to the esteemed panel constituting the Court of Appeals in this case, it is submitted that that Court literally bulled its way to a preconceived conclusion, in order to avoid what it considered to be "an inequitable result" (A-12a), even if it were required "to enact a law" to accomplish that objective. In the process, it brushed aside analogous decisions, including those of this Court, which appeared to point in an opposite direction, ignored the research as to Congressional purpose assembled by the only legal scholar who had seriously analyzed the back-

3. On the authority of *Vallely* at least one court has concluded that "when it appears *on the face of a petition* that a corporation is in the excepted class, the authority of the court to act is absolutely at an end." *In re Pacific States Savings & Loan Co.* 27 F. Supp. 1009 at 1011 (S.D. Cal., 1939).

ground of section 4,[4] grossly misread the legislative history of that section, and leaned far too heavily on the outmoded maxim that statutory exceptions "are to be strictly construed"—all in the name of the rubric that "equality of distribution" is "the theme of the Bankruptcy Act." (A-7a).[5] That its ultimate decision was wrong, is of concern to the parties alone. But the serious consequences which that decision portends in the field of both local and international banking and finance, as well as for bankruptcy jurisdiction generally, are matters that are of common concern and call for this Court's intervention.

It is not without significance that the type of judicial legislation engaged in by the Court of Appeals was undertaken at the very time that Congress itself, in its deliberations on the proposed Bankruptcy Act of 1975 (H.R. 31, 94th Cong. 1st Sess. [1975], prepared by the Commission on the Bankruptcy Laws of the United States, and H.R. 32, 94th Cong. 1st Sess. [1975], sponsored by the National Conference of Bankruptcy Judges), was considering suggested amendments to §4 that would deal directly with the identical question at issue. See, Note: *United States Bankruptcy Jurisdiction over Unregulated Foreign Banks*, 17 Harv. Int'l L.J. 359 at 385 et seq. (1976).[6] Normal judicial

4. Dean Michael Sovern's classic article "Section 4 of the Bankruptcy Act: The Excluded Corporations", 42 Minn. L. Rev. 171 (1957), to which the District Court had made repeated reference, appears to have been accorded short shrift by the Court of Appeals.

5. This "bootstrap" approach to the question of bankruptcy jurisdiction had been rejected by the District Court which had quite properly observed: "[T]his argument [equality of distribution] presupposes jurisdiction under the Act and is of no relevance to the initial determination whether jurisdiction exists. The purpose of enacting the exceptions in §4 was not to achieve equality of distribution, but to avoid application of the bankruptcy laws to what Congress viewed as inappropriate situations." 401 F. Supp. at 1174 (B-29b).

6. This rather searching article deals extensively with the instant case at the District Court level, but was apparently written prior to the reversal by the Court of Appeals.

restraint should have dictated a reluctance to impinge on Congressional prerogatives at this critical stage in the legislative process, leaving it to that body to determine whether the "plain meaning" of the existing statutory language called for any clarifying changes and, if so, the nature and extent thereof. But, as is all too frequently the case when proper judicial bounds are overstepped, the solution here devised by the Court of Appeals leads to unanticipated problems of the gravest character.

If a foreign banking corporation not doing business here but having assets in this country is not a "banking corporation" within the meaning of the voluntary bankruptcy provisions of section 4(a) of the Act, it necessarily follows that such a corporation is not a "banking corporation", for the purpose of *involuntary* proceedings, within the meaning of section 4(b). Thus, the Court of Appeals' determination in this case not only will sanction, but will encourage, the institution of involuntary bankruptcy proceedings against foreign "banking corporations",[7]—as well as foreign railroad corporations, insurance corporations and building and loan associations—having assets in the district where such a proceeding is brought, but in no other way subject to the control of the United States Bankruptcy Court.

The life blood of any banking enterprise, whether domestic or foreign, is its ability to attract and retain deposits. Anything that reflects adversely on the soundness of its financial condition may well result in a sharp increase in the normal rate of withdrawals causing insurmountable liquidity problems for a bank. The disastrous

7. *In re Israel-British Bank B.M. Tel Aviv,* No. 74 B 1635 (S.D.N.Y.), instituted by three *non-resident alien* creditors, is such a proceeding presently pending in the Southern District of New York. *Bankhaus I.D. Herstatt Kga A.i.L.* No. 74 B 1134 (S.D.N.Y.), which has recently been settled, was likewise a proceeding falling within that category.

effect that the mere bringing of bankruptcy proceedings in the United States against a foreign bank may have upon the institution involved as a whole, is too clear to require elaboration. National Bankruptcy Conference, *Report of Special Committee on Insurance Companies and Foreign Banks* Part I: Foreign Banks at p. 16 (1975) (herein "NBC *Report*"). Furthermore, the very knowledge that they are amenable to such proceedings in this country would of necessity induce a disinclination on the part of foreign banks to maintain funds on deposit with banks in the United States, thus undermining relationships that characterize the normal functioning of the international banking community.

Then, too, if our federal Bankruptcy Courts are to be permitted expanded jurisdiction over foreign banking corporations which do not do business in this country, merely on the basis of their having assets in the United States, it is but a fair exercise of international comity for the courts of foreign countries to assume a similarly liberal attitude toward permitting insolvency proceedings to be maintained against United States banks having property within their jurisdiction. NBC *Report, supra,* at 17-18. Indeed, under the Court of Appeals' ruling, it would appear that a state-chartered bank, having assets in another state, could be denied the statutory exemption for a "banking corporation" and be susceptible to involuntary bankruptcy in a federal court in such other state, notwithstanding the fact that rehabilitation proceedings might simultaneously be pending in the state of its domicil.

The doctrine of separation of powers, so basic to our system of government, is a delicate mechanism. To tamper with it, is to run risks which are rarely so apparent as they are in this case. Congress alone can, if it sees fit to do so, adopt a statute allowing foreign banking corporations to avail themselves of voluntary bankruptcy proceedings, and

at the same time foreclose their creditors from instituting involuntary proceedings against them. NBC *Report, supra,* pp. 18-19. Having opened the door to the former possibility, the Court of Appeals was and is incapable—short of reversing itself—of shutting it to the latter.

"Federalism", so heavily relied on by the Court of Appeals to justify its conclusion, is a two-sided coin. When Congress itself has not evinced an intention to exercise its bankruptcy authority under Article 1, section 8 of the Constitution, this Court has recognized that the states have reserved power over property within their territorial limits and the right to apply to it policies of their own formulation for the protection of local creditors which need not be designed to achieve equality of distribution. *Clark* v. *Williard,* 294 U.S. 211, 213 (1935); *Id.* 292 U.S. 112, 123-124 (1934). Preemption of that state power is not to be lightly presumed. For the Court of Appeals to assert federal bankruptcy jurisdiction over foreign banking corporations because it could find "no Congressional purpose to command otherwise" (A-12a), was not to practice "federalism", but rather to subvert it.

By attributing to Congress a purpose which the District Court had painstakingly demonstrated to be wholly lacking, by departing from the path which had been blazed by this Court in *Vallely, supra,* and in *Clark* v. *Williard, supra,* and by arrogating to itself legislative powers with which it had never been constitutionally vested, the Court of Appeals has enlarged the jurisdiction of the Bankruptcy Courts in a fashion which is fraught with perils far beyond any that could reasonably have been within its contemplation. Only this Court can replace the lid on this Pandora's box, and restore to Congress, where it rightfully belongs, the task of delineating, if it deems it appropriate to do so, specific ground rules for bankruptcy jurisdiction with respect to foreign "banking corporations".

Conclusion

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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